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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS M. MARTIR, Defendant and Appellant.	B201720 (Los Angeles County Super. Ct. No. VA083085)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dewey Lawes Falcone, Judge. Affirmed.

Randi Covin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Carlos Martir of the attempted murder of Rafael Anguiano, one of three people Martir shot in an altercation in a restaurant. On appeal, Martir argues that the evidence is insufficient to support the attempted murder conviction and that the trial court erred by failing to instruct the jury on attempted voluntary manslaughter, a lesser included offense. We disagree and affirm.

BACKGROUND

The information charged Martir with the murder of David Valenzuela in violation of subdivision (a) of Penal Code section 187[1] (count 1); the attempted willful, deliberate, and premeditated murder of Anguiano in violation of section 664 and subdivision (a) of section 187 (count 2); and the assault with a semiautomatic firearm of Diana Perez in violation of subdivision (b) of section 245 (count 3). The information also alleged as to counts 1 and 2 that Martir personally and intentionally discharged a firearm causing great bodily injury and death within the meaning of section 12022.53, subdivisions (b), (c), and (d), and as to count 3 that he was a principal armed with a firearm (§ 12022.5, subd. (a)(1)), that he personally used the firearm (§§ 12022.5, 1192.7, subd. (c), 667.5, subd. (c)), and that he inflicted great bodily injury (§ 12022.7, subd. (a)). As to all counts, the information alleged that the crimes were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b).

Martir pleaded not guilty and denied the allegations. The case was tried to a jury, which found Martir guilty on counts 2 and 3 but found that the attempted murder charged in count 2 was not willful, deliberate, and premeditated. The jury found Martir not guilty of first degree murder in count 1 but was deadlocked as between second degree murder and voluntary manslaughter. The court declared a mistrial on count 1. The information was subsequently amended to add a voluntary manslaughter charge and firearm allegation as count 4, and Martir pleaded guilty to that charge and admitted the allegation

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1 All subsequent statutory references are to the Penal Code.

in exchange for dismissal of the murder charge in count 1. The jury found the gang allegation not true but found the firearm and great bodily injury allegations true.

The court sentenced Martir to an aggregate term of 34 years to life in state prison, calculated as follows: On count 2, the high term of 9 years, plus 25 years to life for the firearm enhancement; on count 3, the midterm of 6 years, plus 7 years for the firearm enhancements, to run concurrently with the sentence imposed under count 2; on count 4, the high term of 11 years, plus 10 years for the firearm enhancement, to run concurrently with the sentences imposed under counts 2 and 3. The court also imposed various statutory fines and fees and credited Martir with 1,760 days of presentence custody, consisting of 1,174 days of actual custody credits and 586 days of conduct credits.

The evidence introduced at trial, viewed in the light most favorable to the judgment,[2] showed the following facts: On May 15, 2004, at approximately 11:00 p.m., Valenzuela was at a King Taco restaurant with his girlfriend (Perez), another female friend (Evelyn Hoyos), and two male friends. While Valenzuela and Perez were waiting in line to order their food, the security guard read out the license plate number of a car and asked that the car be moved. Martir stepped out of the line, apparently to move the car, and bumped into Valenzuela. Martir then asked Valenzuela "where was he from" (i.e., Martir challenged Valenzuela to claim or deny his gang affiliation). Valenzuela said he was from the "Florence gang," and Martir said that he was from "K.A.M." (i.e., "Krazy Ass Mexicans").

Valenzuela told Martir "don't disrespect me in front of my girlfriend," to which Martir responded "Fuck that bitch; she's ugly anyway" or "Fuck you and your bitch." Valenzuela then punched Martir in the face. In response, Martir said "You fucked up" and said he had a gun, which he pulled out "within seconds." Valenzuela, Perez, and Hoyos backed away from Martir. Neither Valenzuela nor any of his companions was

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2 We "must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

armed, and Valenzuela did not "do anything with his hands to show that he had a gun" or "pretend like he had a gun."

Martir then shot Valenzuela and Perez. Anguiano, the security guard, had been walking toward the scene of the confrontation as it unfolded. Martir shot Anguiano in the chest "[m]oments" after shooting Valenzuela and Perez. The shooting of Anguiano did not look like "an accident."

Valenzuela, who suffered three gunshot wounds, was able to speak for "about a minute or two" after being shot and then died on the restaurant floor. Perez was shot in the ankle, shattering a bone and requiring her to be hospitalized for four days and to walk with crutches for two to three months. Anguiano was in intensive care for at least two days after the shooting.

At trial, Martir testified in his own defense. He testified that Valenzuela initiated the confrontation by asking Martir where he was from, and that Martir responded "I don't bang." When Valenzuela replied "This is Florence gang," Martir said "whatever, you know. I was like, I really didn't care." Martir testified that he did not say anything about Valenzuela's girlfriend. Martir further testified that even after Valenzuela punched him, he backed up and told Valenzuela that he did not "want any problems." He also claimed that he asked Anguiano for help, but Anguiano "didn't do anything. He just stood there." According to Martir, Valenzuela then said "You're a bitch, so I'll take you out like a bitch," and Valenzuela reached "under his shirt" "close to his belt." Fearing for his own life, Martir then pulled out his own gun and shot Valenzuela. Martir then saw Anguiano approaching and "reaching for his [i.e., Anguiano's] gun." Martir pointed his own gun at Anguiano "to scare him away, and it just went off," wounding Anguiano in the chest.

The restaurant's bartender, Jordan Cantillano, also testified, and his testimony corroborated Martir's account in certain respects. According to Cantillano, Valenzuela was "the aggressor," and Martir was "more defensive" and "was trying to back off." Cantillano also confirmed that he had told an investigating officer both that Martir told Valenzuela he did not "want any trouble" and that Martir asked the security guard for

help. Cantillano further testified that Martir's shooting of Anguiano "looked like an accident." Cantillano also testified that in the middle of the argument with Valenzuela, Martir "broke off," left the restaurant, and then came back and shot Valenzuela. That account of the confrontation conflicted with both the testimony of other witnesses and the security cameras' video recording of the entire incident, which was admitted in evidence and played for the jury. Cantillano testified that he was "positive" that Martir had left in the middle of the argument, and he said he was "equally positive" that "the guard was shot accidentally."

DISCUSSION

I. Sufficiency of the Evidence

Martir argues that the evidence is insufficient to sustain his conviction on count 2, the attempted murder of Anguiano. We disagree.

Martir does not deny that he shot Anguiano in the chest at close range. If a defendant's "use of a lethal weapon with lethal force was purposeful," then "an intent to kill could be inferred, even if the act was done without advance consideration and only to eliminate a momentary obstacle or annoyance." (*People v. Arias* (1996) 13 Cal.4th 92, 162.) Hoyos testified that the shooting of Anguiano did not look like an accident. The jury could have inferred from that testimony that Martir's use of the gun with lethal force was purposeful, and on that basis the jury could have inferred that Martir acted with intent to kill. (*People v. Provencio* (1989) 210 Cal.App.3d 290, 306 [the testimony of just one witness, if not inherently incredible, can be sufficient to sustain a conviction].) The evidence was therefore sufficient to sustain the conviction for attempted murder.

Martir argues on four grounds that the evidence was insufficient to support the necessary finding of intent to kill, but we find none of the four arguments persuasive. First, Martir contends that a "true reflex or startle response" is inconsistent with an intent to kill, and he argues that his shooting of Anguiano was such a "true reflex or startle response" because he "responded instinctively and instantaneously in self-defense when he saw Anguiano moving toward him, reaching for his gun, a mere two seconds after the

fatal shooting of Valenzuela." (Citing *People v. Arias*, *supra*, 13 Cal.4th at p. 162.) The argument fails because the jury was not required to infer that the shooting was a "true reflex or startle response." Rather, the jury could have reasonably inferred from Martir's having shot Anguiano in the chest at close range, and from Hoyos' testimony that the shooting of Anguiano did not look like an accident, that Martir intended to kill Anguiano.

Second, Martir points out that he "fired only one shot at Anguiano" and made "no attempt to shoot him again, though he had ample opportunity as he followed the fleeing Anguiano toward the restaurant's exit." The argument fails, because Martir's failure to fire additional shots at Anguiano did not require the jury to infer that Martir did not intend to kill Anguiano when he shot him. Rather, the jury could have reasonably inferred either (1) that Martir shot Anguiano with intent to kill but abandoned that intent after the shooting, or (2) that Martir shot Anguiano with intent to kill and believed that he had fatally wounded Anguiano (he shot Anguiano in the chest at close range), making additional shots unnecessary. Either way, Martir's failure to fire additional shots at Anguiano is consistent with our conclusion that substantial evidence supports the guilty verdict on the attempted murder charge.

Third, Martir argues that he "did not deliberately initiate the violent confrontation," because "[s]ubstantial evidence" showed that "Valenzuela was the aggressor." The argument fails because the record contains substantial evidence that Martir was the aggressor. The presence in the record of conflicting evidence does not show that the evidence that Martir was the aggressor was insufficient. (See, e.g., *People v. Semaan* (2007) 42 Cal.4th 79, 88 [the trial court's factual determinations must be affirmed if "there is substantial evidence, contradicted or uncontradicted," that supports them].)

Fourth, Martir argues that because section 1192.7, subdivision (a)(2), prohibits plea bargaining in a "serious felony" case unless "there is insufficient evidence to prove the People's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence," the prosecution's

agreement to the plea bargain in which Martir pleaded guilty to voluntary manslaughter in exchange for dismissal of the murder charge constitutes a concession by the prosecution that there was insufficient evidence to prove the murder charge, which would amount to a concession that Valenzuela was the aggressor. Martir cites no case law supporting his argument.[3] We have found none, and we find the argument unpersuasive. The issue of whether the plea agreement violated section 1192.7 is not before us, and it cannot be, because Martir is estopped to raise it. (*People v. Webb* (1986) 186 Cal.App.3d 401, 411-412.) If the issue were before us, however, we would be free to reject the prosecution's (implicit) position that the plea bargain complied with the statute.[4] We therefore are not bound by the prosecution's (implicit) position in our review of Martir's substantial evidence challenge to his attempted murder conviction.

Martir also argues that the evidence is insufficient to sustain the jury's rejection of his contentions that (1) he shot Anguiano because of an honest belief in the need for self-defense and (2) he shot Anguiano in the heat of passion upon a sudden quarrel. Martir's arguments depend, however, on his contention that Valenzuela was the aggressor. For reasons we have already explained, the jury could have reasonably inferred that Martir was the aggressor. Consequently, in reviewing Martir's substantial evidence challenge, we must presume that he was the aggressor. His arguments concerning self-defense and heat of passion therefore fail.

For all of the foregoing reasons, we conclude that Martir's conviction of the attempted murder of Anguiano is supported by substantial evidence.

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3 *People v. Maestas* (2006) 143 Cal.App.4th 247, the sole case Martir cites on this issue, did not hold that a plea bargain in a serious felony case amounts to a binding concession that the requirements of section 1192.7 have been satisfied.

4 Although the trial court approving a plea bargain in a serious felony case "is supposed to indicate on the record which of [the exceptions to section 1192.7] applies" (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1526), neither the trial court nor the prosecution expressed any opinion on the matter. We consequently cannot tell which of the exceptions the prosecution or the trial court thought applied, or whether they simply overlooked the statutory prohibition on plea bargaining.

II. Instructional Error

Martir argues that the trial court erred by failing to instruct the jury on attempted voluntary manslaughter as a lesser included offense on count 2, the attempted murder of Anguiano. According to Martir, the record contains sufficient evidence to warrant such an instruction on theories of imperfect self-defense and heat of passion. We disagree.

"[W]hen a defendant kills in the actual but unreasonable belief that he or she is in imminent danger of death or great bodily injury, the doctrine of 'imperfect self-defense' applies to reduce the killing from murder to voluntary manslaughter." (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) The record contains no evidence that Martir actually believed that Anguiano posed an imminent threat of death or great bodily injury. Martir did not testify that he held such a belief, and the surrounding circumstances would not otherwise support a reasonable inference that he held such a belief. There was therefore insufficient evidence to warrant a voluntary manslaughter instruction on an imperfect self-defense theory.

The heat of passion theory of voluntary manslaughter is based on provocation, which must either be caused by the victim (*In re Thomas C.* (1986) 183 Cal.App.3d 786, 798) or be conduct reasonably believed by the defendant to have been engaged in by the victim (*People v. Brooks* (1986) 185 Cal.App.3d 687, 694), and which must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*People v. Berry* (1976) 18 Cal.3d 509, 515.) The only putatively provocative conduct by Anguiano, a uniformed security guard, was his approaching Martir and reaching for his (i.e., Anguiano's) gun. That is not conduct that would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. There was therefore insufficient evidence to warrant a voluntary manslaughter instruction on an imperfect self-defense theory.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.